OEDCA DIGEST

Vol.V, No. 1 **Department of Veterans Affairs** **Winter 2002**
Office of Employment Discrimination
Complaint Adjudication

Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent, adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final decision or order on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include disability claims based on stress disorders, *Equal Pay Act* claims, manipulation of the promotion process, dismissal of complaints due to a previously filed grievance, failing to state a claim, racial harassment, disability accommodation requests, and police investigations in VA facilities.

Also included in this issue are frequently asked questions concerning the collection, use, and disclosure of genetic information; and a discussion of the U.S. Supreme Court's recent decision involving claims of disability status based on manual task limitations.

The *OEDCA Digest* is available on the World Wide Web at: *www.va.gov/orm*.

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I

DISABLED EMPLOYEE NOT ENTITLED TO A NEW SUPERVISOR TO ACCOMMODATE HER STRESS DISORDER

The complainant, a medical clerk, alleged that she was suffering from an anxiety stress disorder. As an accommodation, she requested, among other things, a reassignment away from her supervisor, who she claims was the cause of her stress.

The complainant presented medical evidence showing that the symptoms of her condition may include lack of sleep, intermittent chest pains, poor eating habits, and nightmares. She also presented evidence that she was taking medication – Zoloft – for her condition.

The complainant admitted that her medication allowed her to function normally, both on and off the job; and that none of her major life activities, including working, was limited. She further admitted that the medication allowed her to perform all of the essential duties of her medical clerk position, which consisted of typing, filing, answering phones, and making appointments. The only thing she claimed her condition prevented her from doing was working for her supervisor.

Management temporarily reassigned her to another facility, pending a review of and determination on her accommodation request. Following that review, a reasonable accommodation committee concluded that the complainant was not "disabled", denied her accommodation request, and ordered her to return to her official duty station. She refused, stating she could no longer work for her supervisor, and was accordingly charged with AWOL. She thereafter filed a discrimination complaint alleging, among other things, that the rejection of her request for a new supervisor was a denial of reasonable accommodation and, hence, discriminated against her because of her disability.

After reviewing the evidence in the record, OEDCA concluded that management had not discriminated against the complainant. First, OEDCA agreed with the reasonable accommodation committee's conclusion that the complainant was not disabled. While she clearly had a stress disorder, her medication allowed her to function normally, and she was unable to identify any major life activities that were substantially limited by the disorder. Under the *Rehabilitation Act*, for a medical condition or impairment to constitute a disability, it must "substantially limit" one or more major life activities. When determining if a medical condition or impairment is "substantially limiting", recent Supreme Court cases require courts and administrative fact-finding bodies to consider the effects of medication, assistive devices, and compensating behaviors.

In this case, the effects of the complainant's medication were such that her condition was no longer substantially limiting; hence she was not disabled. She admitted that she could perform all of the essential functions of her job and that none of her major life activities were substantially limited when taking the medication.

Second, even assuming the complain

ant was disabled, the accommodation she requested, *i.e.,* a new supervisor, is not required by the *Rehabilitation Act*.

II

AGENCY DID NOT VIOLATE *THE EQUAL PAY ACT* WHEN IT HIRED MALE NURSE AT HIGHER GRADE AND PAY THAN FEMALE NURSE

The complainant alleged that a male LPN (Licensed Practical Nurse) was hired in September 2000 at the GS-6, Step 9 pay grade, while she was hired to do the same job, but at a lower grade and step – GS-5, Step 4. She claimed that this disparity in pay constitutes gender discrimination in violation of the *Equal Pay Act*.

The evidence in the record indicates that the complainant was hired more than two years before the male LPN was hired. In addition, the evidence showed that at the time the male LPN was hired, there was a shortage of LPNs, and the medical center was experiencing recruitment difficulties because other hospitals in the community were offering higher starting salaries. To deal with this problem, VA regulations authorize medical center directors to offer above minimum entrance rates, or to match or even exceed an applicant's current pay, as an inducement to work for the VA.

In this case, the medical center initially offered to hire the male LPN at the GS-5, Step 4 level (the same grade and step at which the complainant was initially hired. He refused the offer because he was earning more -- approximately $33,000 per year -- at his current job. After submitting proof of his salary, the medical center offered to hire him at the GS-6, Step 9 level, which provides an annual salary of $33,283. He accepted the offer.

The complainant, who had already been working for the VA for over two years at the time the male LPN was hired, was at that point earning only $30,983 annually (*i.e.*, GS-6, Step 3). She therefore claims that gender was a factor in her lower salary rate, while management claims that it was the realities of the market place, not gender, which produced the disparate result.

Even, as in this case, where there is no actual intent to discriminate, an employer may violate the *Equal Pay Act* if it pays wages to employees at a rate less than the rate paid to employees of the opposite sex for <u>equal</u> work on jobs the performance of which require equal skill, effort, and responsibility, and which are performed under similar working conditions.

"Equal work" does not mean that the jobs must be identical, but only that they must be "substantially equal" – meaning they must be similar in the sense of being "closely related" or "very much alike." It is the actual job content and job requirements, and not necessarily the official job "PD", which are controlling when determining if jobs are substantially equal.

If jobs that pay differently are substantially equal, the burden of proof then falls on the employer to show that the pay difference can be explained by one of four defenses specifically permitted

under the *Equal Pay Act*. The employer must show that the difference can be explained by a (1) seniority system, (2) a merit system, (3) a system based on quantity or quality of production, or (4) **"any factor other than sex."**

In this case, it was undisputed that the complainant was performing "equal work." She and the male comparator worked under the same position description at the same facility, and were doing essentially the same work, albeit in different units. Hence, the complainant established a *prima facie* case, and the burden then shifted to management to prove that the pay difference was justified under one or more of the four exceptions specified in the *Equal Pay Act.*

Based on the evidence presented, OEDCA concluded that management had not violated the Act because it demonstrated that the fourth exception in the Act – *i.e.*, a "factor other than sex" – justified the pay differential. As noted above, the nurse shortage, coupled with higher starting salaries at other community hospitals, forced management to pay a higher starting salary to the male applicant, who was unwilling to take a pay cut to work for the VA. This reason, though producing a disparate result as far as the complainant was concerned, is permissible under the *Equal Pay Act*, as it is based on a factor other than sex.

III

MANIPULATION OF THE PROMOTION PROCESS BY SELECTING OFFICIAL RESULTS IN FINDING OF DISCRIMINATION

OEDCA recently accepted and implemented an EEOC administrative judge's decision finding that a complainant was correct in his assertion that he was discriminated against because of his race (Native American) and age (46) when he was not selected for a Locksmith position.

The complainant applied for the Locksmith position when it was initially announced at the GS 7 (Target 9) level. The announcement indicated that applicants would be rated on their experience as a locksmith. Out of eight applicants, Human Resources Management Service (HRMS) certified only the complainant and one other applicant as qualified for the position and referred both names to the selecting official (hereinafter the RMO). Immediately upon receiving the "cert", the RMO returned it to HRMS, requesting cancellation of the announcement and reannouncement of the vacancy as an Upward Mobility position, GS-5 (Target 9). The personnel specialist in HRMS complied with his wish.

The reannouncement indicated that applicants would be rated on their job performance rather than experience as a locksmith. Under the reannouncement, HRMS certified only two out of eleven applicants as qualified – the complainant, who had eleven years of locksmith experience, and a 38 year-old Caucasian with no locksmith experience. The RMO selected the 38 year-old Caucasian, even though he had been found unqualified for the position under the cancelled announcement. His reason was that the complainant's performance as a backup locksmith was

poor -- so poor that they wanted to fire him.

The EEOC judge found that a preponderance of the evidence indicated that management's reason for not choosing the complaint was not the true reason, but was, instead, a pretext for discrimination. For example, despite the assertion regarding the complainant's poor performance, he was not fired. In fact, he received satisfactory performance appraisals, and was even commended for doing a good job. In addition, the reannouncement of the position, coupled with the elimination of locksmith experience as a rating factor appeared, on its face, to be nothing more than an inartful attempt to manipulate the promotion process so as to reduce the complainant's chances of being selected.

Moreover, the judge noted that there were contradictory explanations given by the RMO and his supervisor for requesting the reannouncement. Finally, in addition to the complainant's clearly superior qualifications as a locksmith, there was persuasive evidence in the record to support the complainant's claim that the RMO had referred to him as a "big dumb Indian."

IV

MANIPULATION OF THE PROMOTION PROCESS BY SELECTING OFFICIAL RESULTS IN FINDING OF DISCRIMINATION -- AGAIN

The complainant applied for a Supply Technician position, but was found unqualified during the initial screening stage by a personnel assistant in Human Resources Management Service. He subsequently filed a discrimination complaint alleging, among other things, that his disqualification was due to his gender. He claimed that the female applicant who was ultimately selected was far less qualified, and that the selecting official actually put pressure on the personnel assistant to find the complainant unqualified.

The EEOC administrative judge found persuasive evidence to support the complainant's assertions. The judge found that management's explanation – *i.e.*, that the complainant's disqualification was an innocent mistake on the part of the personnel assistant – lacked credibility. The record was replete with instances in which the personnel assistant failed to follow proper procedures when rating the applicants, and that all of the mistakes harmed the complainant and benefited the selectee. He consistently subjected the selectee's application to a lenient standard of review, resulting in her being found qualified, and the complainant's to a stricter review standard, resulting in his disqualification.

Moreover, the judge found that the personnel assistant's testimony was inconsistent, thus further detracting from his credibility. For example, at one point he stated that the complainant was unqualified because the words "electronic inventory" did not appear in his application; yet he later indicated that the complainant was over-qualified. He also testified that he has been "tormented" by his decision to disqualify the complainant.

Finally, the judge accepted as credible the complainant's assertion that the per

sonnel assistant confided to him that the selecting official was involved in his disqualification, and that what happened to him was "underhanded", "dirty", and that "they're [agency officials] going to get their butts caught in a ringer."

The preponderance of the evidence pointed to the fact that the selecting official pressured the personnel assistant to disqualify the complainant, in order to facilitate her desire to choose another applicant.

V

COMPLAINANT NOT ALLOWED TWO BITES AT THE APPLE

The VA's Office of Resolution Management (ORM) recently dismissed a complaint on procedural grounds, because the employee had previously raised the same matter in a negotiated grievance procedure.

According to the record, the employee was covered by a collective bargaining agreement that expressly permits claims of discrimination to be raised in a negotiated grievance procedure. In April, the employee filed a grievance concerning his transfer to the day shift under procedures spelled out in the bargaining agreement. About a month later, he filed a formal EEO complaint claming that his transfer to the day shift discriminated against him because of a disability. The employee eventually received a "Step 3" decision denying his grievance.

EEOC's regulations provide that when a person is employed by an agency subject to certain provisions of Federal law relating to negotiated grievance procedures,[1] and the person is covered by a collective bargaining agreement that permits claims of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or grievance on a matter of alleged employment discrimination must elect to raise the matter under either EEOC's regulations (*i.e.*, in the EEO complaint process) or under the negotiated grievance procedure, but not both.

A covered employee who files a grievance under the above-described procedure may not thereafter file an EEO complaint on the same matter. This rule applies regardless of whether the agency informed the employee of the need to elect, or whether the grievance raised a claim of discrimination. Any such EEO complaint filed after a grievance has been filed on the same matter must be dismissed. If the EEO complaint is dismissed for this reason, the employee retains the right to continue proceeding through the negotiated grievance procedure, including the right to appeal the final decision on the grievance to the EEOC.

The purpose of this somewhat complicated rule is simply to prevent dual processing of the same matter in different forums. Dual processing is time-consuming and costly, and could produce inconsistent results. The only exception to this prohibition occurs when the negotiated grievance procedure does not permit claims of discrimination to be raised in the grievance procedure.

[1] The VA is subject to such provisions.

In this case, since the complainant was covered by a collective bargaining agreement, and since that agreement permitted claims of discrimination to be raised in the negotiated grievance procedure, and since the complainant elected the negotiated grievance procedure by filing his grievance before filing his EEO complaint, ORM properly dismissed the EEO complaint.

Employees should not confuse negotiated grievance procedures with an agency's own internal grievance procedure. Agency grievance procedures are established by the agency's own regulations and are available to any agency employee. The above-described prohibition against dual processing applies only to negotiated grievance procedures. Hence, agencies are prohibited from dismissing an employee's EEO complaint simply because the employee previously filed an "agency grievance" on the same matter.[2]

VI

COMPLAINT ABOUT "BEING WATCHED" FAILS TO STATE A CLAIM

It is not uncommon for employees to feel that their supervisors are watching them. In a recent case, an employee filed an EEO complaint alleging that his supervisor was harassing him due to his race by constantly watching him.

[2] However, some agency grievance procedures may require dismissal of the agency grievance if there is an EEO complaint regarding the same matter.

The VA's Office of Resolution Management (ORM) dismissed his complaint for failure to state a claim. On appeal, the EEOC affirmed ORM's dismissal decision.

In its appellate decision, EEOC noted that the complaint was too vague and generalized to state a claim. Even if proven to be true, the complainant was simply not "aggrieved" (*i.e.*, injured or harmed) by his supervisor's actions. There was no evidence in the record that the supervisor took any concrete action against the complainant.

Moreover, the EEOC held that the allegation also failed to state a claim of "harassment", because the matter complained of was not sufficiently severe or pervasive to alter the conditions of his employment – one of the requirements for proving a claim of harassment.

VII

COMPLAINT ABOUT "BEING INVESTIGATED" FAILS TO STATE A CLAIM

An EEOC administrative judge recently dismissed a complainant's claim that he was discriminated against on account of his gender when he became the subject of an investigation.

A subordinate had accused the complainant of misconduct involving the use of a government vehicle. When the accusation came to management's attention, they conducted an investigation. The results of the investigation were inconclusive, and no disciplinary action was taken against the complainant.

The EEOC judge concluded that the complainant had not been subjected to an adverse employment action. Although there was an investigation, he was not disciplined; hence, he was not aggrieved. Because he was not aggrieved by management's actions, he failed to state a claim of gender discrimination.

Moreover, the judge found that he failed to state a claim of gender-based harassment, because the matter complained of – being investigated – was not sufficiently severe or pervasive to alter the conditions of his employment.

VIII

REQUESTS FOR PERSONNEL ACTIONS MAY NOT CONSTITUTE REQUESTS FOR DISABILITY ACCOMMODATION

The complainant alleged that management subjected her to disparate treatment based on disability when officials denied her requests for reassignment, upgrade, and a desk audit. She also alleged that management failed to reasonably accommodate her disability.

The complainant claimed that she was disabled because she had asthma and bronchitis. However, she stated that her condition had almost no impact on her life. It caused shortness of breath when she worked in stuffy areas, and she became hoarse at times. Otherwise, her condition did not limit her in any way. OEDCA found that the complainant was not disabled because her impairments did not substantially limit any major life activity. Therefore, management was not obligated to accommodate her condition.

Furthermore, the complainant made no reference to her physical impairments in her requests for relocation, upgrade, or desk audit. She had requested reassignment to another division because of the "extreme pressure and stress" in the section where she worked. She requested an upgrade of her GS-5 position to GS-6, along with a desk audit, because she claimed that she was doing GS-6 level work. She did not cite her physical impairments as a basis for any of these requests. Thus, OEDCA did not construe these requests as requests for ***accommodation.***

The only accommodation requests in the record were notes from the complainant's physician in which he asked that the complainant work in a well-ventilated work area and that she not answer the telephone when hoarse. Management readily granted these requests, but did so as a matter of comity, and not because the complainant was entitled to accommodation under the *Rehabilitation Act*. OEDCA found no basis for the complainant's assertion that management failed to accommodate her. In fact, management officials accommodated her conditions even though the law did not require them to do so.

IX

POLICE INVESTIGATION NOT DUE TO RACIAL PROFILING

An employee filed a discrimination com

plaint alleging that an investigation by VA and municipal police officers in connection with a theft was the result of racial profiling.

The complainant, an African-American, was approached by a VA police officer while working at her desk in a patient area. The officer, a Caucasian male, informed her that he was investigating a theft from the VA Canteen store, and that a coworker had seen her in the company of a man whose features and clothing matched the description of the individual being sought for the theft. The complainant became angry and defensive, and refused to provide the officer with any information.

The VA officer left the complainant's work area and returned a short time later with an officer from the municipal police department. According to witnesses, the municipal officer, an African-American, warned the complainant that he would handcuff and arrest her if she refused to answer questions. Several of the complainant's coworkers were present during this encounter.

A supervisor soon arrived on the scene in response to a call from the complainant. The supervisor stated that voices were raised and the complainant was not cooperating with the officers. Because they were in a patient area, the supervisor requested the officers to escort the complainant to the personnel office where they could continue their inquiry without an audience. Shortly after arriving in the personnel office, the officers received information indicating that the person seen with the complainant was not the same person being sought in connection with the theft.

After thoroughly reviewing the evidence, OEDCA concluded that this incident, although unfortunate and poorly handled from the outset, was not the result of racial profiling and was not otherwise racially motivated. The officers, one of whom was African-American, were relying on information that reasonably led them to believe that the complainant might have information about the theft. Moreover, the complainant admitted that she had refused to cooperate.

Although this complaint resulted in a finding of no discrimination, the complainant can take satisfaction in the fact that her complaint resulted in a positive change in security procedures at the facility. Following this incident, the medical center reviewed those procedures and discovered that there no were rules governing the questioning of employees by VA and/or other law enforcement officers on VA property. Accordingly, the facility instituted a policy requiring that such questioning occur in private and away from the employee's work area.

X

WHITE EMPLOYEE AND AFRICAN-AMERICAN WORKERS WITH WHOM HE ASSOCIATED SUBJECTED TO RACIAL HARASSMENT

In a recent, highly publicized case, OEDCA accepted and fully implemented an EEOC administrative judge's decision finding that a white employee at a VA hospital had been subjected to race-based harassment because of his association with Black coworkers.

The complainant was a carpenter and maintenance mechanic. Over a period of two years, he had been assigned the position of acting work leader for three independent projects. In connection with these projects, he was assigned crews of Compensated Work Therapy (CWT) workers, most of whom were African American. The CWT workers were veteran-patients who, as part of their therapy, worked on the projects for nominal wages. While directing their work on these projects, he befriended and supported the black CWT workers, teaching them carpentry skills and assisting them in getting their GEDs.

The complainant remained assigned to the carpentry shop, where he was supervised by a white male, and was required to return to the carpentry shop on a daily basis throughout the course of the projects. While there, white coworkers often subjected him to racially derogatory comments concerning his association with the black workers. His coworkers also brought racist audio and videotapes to the shop, and frequently used racial slurs and epithets when referring to the black workers under his supervision. He also experienced threats of physical violence by a white employee of the carpentry shop because of his association with the black workers.

The complainant and several of the CWT workers met with the project manager to express their concern over the racial hostility in the carpentry shop. The complainant also spoke with two service chiefs regarding the problem. However, other than meeting with the offending employees and later issuing a memo stating that racial harassment would not be tolerated, management officials did nothing to correct the problem.

When the nursing home project ended, the complainant was required to return to the carpentry shop, despite his request to be assigned elsewhere because of the racially hostile environment and concerns over his safety. The day after he returned, a physical altercation took place between one of the carpentry shop employees and the complainant, resulting in the issuance of reprimands to the complainant, three white coworkers, and the complainant's supervisor. All reprimands, except for the complainant's, were later downgraded to admonishments.

Within days of the altercation in the shop, the complainant left work upon the advice of his physician. He did not return for a period of approximately six months. Upon his return, he was reassigned to a position as a driver, where he complained of several other incidents of racial harassment. The other employees of the carpentry shop, as well as the supervisor, remained in their positions with the shop.

The EEOC administrative judge and OEDCA found persuasive evidence to support the testimony of the complainant and his black coworkers regarding the racial hostility in the carpentry shop. Moreover, the VA was found liable for the harassment because the complainant's immediate supervisor was aware of the problem and took no corrective action. In addition, higher-level management officials either did nothing when informed of the problem, or their attempts to address the problem were

belated, ineffective or inappropriate. OEDCA's Final Order directed the Department to pay the complainant $48,369.41 in attorney's fees and $144,549.56 in compensatory damages. It also directed the Department to take appropriate corrective action with respect to the workers and supervisors involved, and to take whatever other actions are necessary to ensure that violations similar to those found in this case do not recur.

From a legal standpoint, the lesson of this case for managers and supervisors is simple. Failure by management officials to take prompt, appropriate, and effective action as soon as they become aware of a hostile environment will inevitably result in the Department being held liable for the harm caused by that environment.

XI

U.S. SUPREME COURT NARROWS SCOPE OF *AMERICANS WITH DISABILITIES ACT*

In a unanimous decision, the Supreme Court recently ruled that to be substantially limited in the major life activity of performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.

The plaintiff sued her employer, Toyota, claiming that her medical condition, carpal tunnel syndrome, rendered her disabled within the meaning of the *Americans with Disabilities Act.* Specifically, she claimed that she was unable to perform certain manual tasks in her specialized assembly line job; and that Toyota, instead of firing her for failing to report to work, should have provided her with a reasonable accommodation. The tasks she was unable to perform involved holding her hands and arms up around shoulder height for several hours at a time. She was, however, able to perform other job-associated tasks on the assembly line and was able to perform common, every-day tasks such as bathing, household chores, brushing her teeth, *etc.*

In its decision, the Supreme Court noted that to prove disability status, it is not enough merely to submit evidence of a medical diagnosis of an impairment. In order for a medical condition to constitute a "disability" within the meaning of the *Americans with Disabilities Act*, the impairment must substantially limit one or more major life activities. Thus, an individualized assessment of the effect of an impairment is necessary, especially when its symptoms vary widely from person to person, as is the case with carpal tunnel syndrome.

The plaintiff was claiming that her ability to perform manual tasks – a major life activity – was substantially limited because she was unable to perform a "class" of tasks associated with an auto assembly line. The Court, however, found that her impairment was not substantially limiting. The Court held that when addressing the major life activity of performing manual tasks, the central inquiry must be whether the individual is unable to perform the variety of tasks central to most people's daily lives, not whether the individual is unable to perform tasks associated with a specific

job.
In this case, the plaintiff was able to perform most manual tasks important to daily life, such as tending to her personal hygiene and performing household chores. The fact that she was unable to perform specialized tasks associated with an auto assembly line was not sufficient to prove that she was substantially limited in performing manual tasks. Hence, because her impairment was not substantially limiting, she did not have a manual-task disability as a matter of law. Because she did not have a manual task disability, Toyota was not required to accommodate that impairment.[3]

XII

ADVICE TO MANAGERS CONCERNING MANIPULATION OF THE PROMOTION PROCESS

(Two of the cases reported in this digest involve attempts by managers and selecting officials to rig the promotion process to benefit and/or harm certain employees or applicants. A recent article in "FEDmanager", reproduced below, warns of the consequences for managers who engage in this practice.)

News that the Office of Special Counsel recently settled a case concerning promises to a group of employees for a non-competitive promotion and pressure to that same group not to apply for a competitive promotion raises several points that managers should remember.

First, the rules on promotion are strict and not necessarily in the control of the supervisor. There are only three ways to be promoted. The first is a career ladder, for which the supervisor may be able to make an effective recommendation. The positions and grades to which a career ladder promotion applies are determined in advance. The employee is entitled to promotion when he or she can perform at the next higher level, usually after at least one year in the lower grade.

A second way to promote non-competitively is by accretion of duties. This method is complex and requires the assistance of HR. A misstep can result in constructive demotion claims by other employees. Sometimes accretion of duties promotions is set aside because the added duties are contrived or are insufficient to support the higher grade level.

Finally, employees can be promoted competitively. The competitive process has to be open and fair and should result in selection of the best candidate.

What supervisors need to remember is that manipulation of promotions can be a prohibited personnel practice. Rigging the area of competition, special favors in the process to those favored, roadblocks to those disfavored, and discouraging someone from applying are all taboo and could result in a Special Counsel prosecution.

Supervisors should simply promote those who are deserving and qualified, and leave the game playing out of the

[3] The Supreme Court remanded the case to a lower court to determine if the plaintiff might have been disabled for other reasons.

promotion consideration process.

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XIII

FREQUENTLY ASKED QUESTIONS CONCERNING THE COLLECTION, USE, AND DISCLOSURE OF GENETIC INFORMATION

On February 8, 2000, former President Clinton signed Executive Order 13145, which prohibits discrimination in the Executive Branch on the basis of protected genetic information. The purpose of the Executive Order was to ensure that Executive Branch employees and applicants are judged on their current ability to perform the jobs they seek or hold, and not on the possibility that they might, in the future, develop a disease or condition. The Equal Employment Opportunity Commission (EEOC) issued policy guidance on July 26, 2000, explaining the types of genetic information protected by the Executive Order; examples of how the Executive Order affects the collection, use, and disclosure of protected genetic information; and how an individual can establish that he or she has a disability based on protected genetic information. What follows are some FAQs regarding the Executive Order and EEOC's policy guidance.

1. Who is covered by the Executive Order?

Applicants, employees, and former employees of Executive branch departments and agencies are covered. Individuals employed in the private sector are not covered.

2. Did the Executive Order create any new rights for applicants or employees of such departments or agencies?

No. The Executive Order did not create new rights. The Executive Order established a policy of nondiscrimination based on "protected genetic information" and directed the head of each department or agency to identify a high-level official to be responsible for implementing this policy. The Executive Order directed the EEOC to coordinate this policy of nondiscrimination on the basis of "protected genetic information."

3. What does "protected genetic information" mean?

Protected genetic information" means:

- information about the results of an individual's genetic tests, and the genetic tests of that individual's family members; and
- information about the occurrence of disease, or medical condition or disorder in family members (*i.e.,* family medical history).

4. Why is family medical history considered "protected genetic information"?

Family medical history does not provide information about an individual's current ability to perform a job. Therefore, family medical history, like genetic test results, is "protected genetic information" under the Executive Order.

5. Is information about an applicant's or an employee's current health status considered "protected genetic information"?

No. "Protected genetic information" does not include an applicant's or an employee's current health status information, such as age, gender, and physical examination results, exclusive of family medical history.

The *Rehabilitation Act* and other laws, however, regulate when departments or agencies may request or require applicants and employees to take medical examinations.

6. What is prohibited under the Executive Order?

Departments and agencies are prohibited from using "protected genetic information" for employment decisions. They also are prohibited from collecting and disclosing such information, with limited exceptions.

7. May departments and agencies require applicants and employees to take genetic tests?

Generally, no. However, there are two limited exceptions to the prohibition on genetic testing. First, the Executive Order allows genetic monitoring of employees for the effects of toxic substances in the workplace under limited circumstances. Second, the Executive Order permits department or agency health offices to collect "protected genetic information" about employees who use the genetic or health care services offered by the health office. In both instances, the Executive Order imposes several requirements in order to prevent the departments or agencies from using the "protected genetic information" as a basis for employment decisions.

8. May departments and agencies require applicants and employees to provide family medical history?

Generally, no. There is one exception: departments and agencies may request family medical history when they are allowed to make disability-related inquiries of post-offer applicants and employees under the *Rehabilitation Act*. Departments and agencies may only use such family medical history to decide if further medical evaluation is needed to diagnose a *current* disease that could prevent an individual from performing the essential functions of the position held or desired.

9. May departments and agencies disclose "protected genetic information"?

Generally, no. Disclosure is permitted only:

- to the employee;
- to Executive branch officials investigating compliance with the Executive Order;
- to an occupational or other health researcher conducting research that complies with 45 CFR Part 46 (concerning research involving human subjects);
- in response to a judicial order or a congressional subpoena; and
- as required by federal law.

10. What is the relationship of the Executive Order to section 501 of the Rehabilitation Act, which prohibits discrimination in federal employment against qualified individuals with disabilities?

Applicants and employees who believe that a department or agency has violated the Executive Order by discriminating on the basis of "protected genetic information" **may** be able to establish coverage as "an individual with a disability" under section 501 of the *Rehabilitation Act*.

11. Can an individual <u>be regarded as</u> having a substantially limiting impairment based on the results of genetic tests or family medical history?

Yes. A department or agency that makes an adverse employment decision because of an individual's genetic test results or family medical history may be regarding an individual with no known impairments as having an impairment that substantially limits a major life activity.

12. Can an individual with a misspelled or altered gene associated with a severe disease or disorder be covered under the actual disability prong of the definition of disability under the Rehabilitation Act?

Yes, in limited circumstances. Under the Rehabilitation Act, the term "impairment" means any physiological disorder. A misspelling or alteration in a gene causes cellular and molecular changes leading to disturbances in cell function. Therefore, the misspelling or alteration is an "impairment" for purposes of section 501 of the *Rehabilitation Act*. To constitute a disability, however, an “impairment” must substantially limit a major life activity.

For example, in *Bragdon v. Abbott,* the Supreme Court held that reproduction is a major life activity. If an individual has a misspelled or altered gene associated with a severe or fatal disease or disorder, and this misspelled or altered gene substantially limits him or her in the major life activity of reproduction, then the individual would have an actual disability.

13. How can an individual pursue a complaint under section 501 of the Rehabilitation Act alleging discrimi

nation based on genetics?

An individual should follow the same procedures generally used for other types of Federal sector employment discrimination complaints.